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A Critical Examination of Overreach in Judicial Decision-Making by the Constitutional Court of South Africa

Introduction

Oliver Wendell Holmes believed that the law's lifeblood has been experience.¹ That is, judges should avoid conjecture. They should, as far as possible, appreciate that societal experience is the wellspring from which laws derive. In other words, legal rules are responses to questions grounded in real-world problems. I agree with Justice Holmes's position.

I contend that judges have to be practical when they decide cases that are doctrinally close or unclear. They should do so because the legal rules they develop and apply are merely manifestations of policy considerations which are, in turn, informed by other disciplines.² That is, legal rules give effect to conclusions reached in other disciplines. And, where existing laws are indeterminate – by which I mean that they do not, of themselves, enable the decider to dispose of the instant case – the justices must look elsewhere for bases, even if they only do so implicitly. So justices should accept that adjudication is often consequence-based (pragmatic) and not merely rule-bound (legalist).³

To be sure, I expect it can be hard to adjudge at exactly what point, in a complex or novel case, a judge ends up taking pragmatism too far and appropriates powers best left to elected lawmakers.⁴ But, having said that, my central case in this essay is simply this: the Constitutional Court has practiced pragmatic adjudication too broadly in both its development of the principle of legality and in Bill of Rights matters. In general terms, justices should, when deciding cases, recognise some reasonably workable limiting factors. They should do so for two reasons: (a) to preserve the distinctive nature of legal reasoning and (b) to foster a fairly effective, but not rigid, separation of governmental powers. That is,

¹ Holmes O. 'The Common Law, Lects' (1881)

² Posner R. 'Decline of Law as an Autonomous Discipline' (1986-1987) 100 *Harvard Law Review* 766-770.

³ Posner R. *How Judges Think* (2008) at 40 -41.

⁴ Cooper S. 'Considering "Power" in Separation of Powers' (1993) *Stanford Law Review* 380-381

certain characteristics make reasoning distinctly legal. And, if the decider's thought process loses the requisite traits, it loses the character that makes it legal, which is destructive of courts' role in society. And, excessive pragmatism turns judges into legislators, which subverts their legitimacy. The Constitutional Court's relatively recent record shows that it has not lived up an appropriate standard of decision-making and, in adjudicating in ways that expand pragmatism enough to undermine law's fundamental nature and imperil the separation of powers, the Court has, to my mind, jeopardised its legitimacy.

The obvious goal is to reign in pragmatism. While I will not try to produce a fixed list of factors that could restrict pragmatism, I will recommend three constraints: one, the court should be candid about the extra-legal repositories of knowledge that inform its decision-making. Two, the court should remind itself, as a matter of course, that bold, discretion-based developments undercut predictability. And three, the Court should tether its pragmatism as closely as possible to express constitutional provisions to guard its legitimacy by enabling disputing parties, as far as realistically feasible, to predict how the Court will rule. That is, courts should strive for reasonably predictable pragmatism.

I will divide this paper into five sections. In the first part, I will offer a definition of pragmatic adjudication. I will, in the second section, expand on my discussion of adjudication by touching on form, purpose and limits pertaining to adjudication. Third, I will discuss the South African incarnations of the separation of powers and the democratic principle. More specifically, I will aim to show that these South African incarnations make it necessary for courts to think critically, and act responsibly, in their pragmatic adjudicative roles. Fourth, I will bring up specific sorts of adjudicative overreach by the Constitutional Court. That is, I will discuss the Constitutional Court's objectionable development of the principle of legality and its mishandling of bill of rights adjudication. Put differently, I will ask and answer this question: how do the specific instances show (1) an undermining of law's character and (2) that a breach of the separation of powers is rendered more likely. Finally, I will argue that given the inescapability of pragmatism when deciding hard cases that are not covered by existing doctrine, and which require reference to extra-legal disciplines, judges should constrain their own discretionary powers by candour, realism and hewing as closely as

possible to express rules, texts or provisions. In other words, they should aim for predictable pragmatism.

An examination of pragmatic adjudication

I will define pragmatism against its doctrinal obverse: legalism. The legalist approach to adjudication states that legal decisions can be made without reference to extra-legal disciplines such as economics or political science.⁵ In other words, the decider need not look any further than the text of the relevant provision and germane set of facts to prefer one of competing claims. It holds that proper adjudication obviates the need for judicial discretion. In Posner's words:⁶

Legalism treats law as an autonomous discipline, a "limited domain." Since the rules are given and have only to be applied, requiring only (besides fact-finding) reading legal materials and performing logical operations, the legalist judge is uninterested professionally in the social sciences, philosophy, or any other possible sources of guidance for making policy judgments, because he is not engaged, or at least he thinks he is not engaged, in making such judgements. It thus counts against legalism as a description of the behaviour of American judges that the availability to them (for example, on the World Wide Web) of extralegal materials that a pragmatist might think relevant to a judicial decision has led to more frequent mention of those materials in judicial opinions. It also counts against the descriptive adequacy of legalism that judges are expected to have "good judgment," to be wise, experienced, mature; none are qualities requisite in a logician.

⁵ Posner (note 3 above) at 41. Gerwartz largely agrees with Posner's understanding of and support for pragmatism. See Gerwartz P. The Pragmatic Passion of Stephen Breyer (2006) *Yale Law Journal* at 1676

⁶ Ibid at 42.

Thus Posner rightly considers this legalist doctrine a fig leaf. And he claims critics who consider law through lenses of economics and political science have convincingly assailed legalism.⁷ He favours pragmatism, which is, at bottom, the candid consideration of consequences in legal reasoning.⁸ The court's focus is on the ruling's probable impact, not the ordinary grammatical meaning of the provision's language.

I would just emphasise that legalism is not irrelevant. Realistic deciders, as Posner notes, are legalists when possible and pragmatists when necessary.⁹ If the case is clear, then there is no need to go beyond the provision and the jurisprudential paper trail. The decider would merely make a straightforward application and move on to the next case. It is only when the instant question cannot be addressed with existing law that justices who have the authority to overturn settled law (or even first instances courts that face genuinely new questions) must be pragmatic for if there is no law governing the specific issue, controlling the outcome in the instant dispute, it can only follow that some other store of knowledge must do so.

So Posner properly contends that it is farfetched to think legalism an appropriate adjudicative theory in all cases. That must be right. The facts in question could present a genuinely new question that the legislature either failed to consider or failed to cover. For instance, the question may arise as to whether a respondent breached a legal provision. The case may be close in that on the provision's language alone, it might be unclear as to whether a violation took place. How might a competent court, without the benefit of clear jurisprudential or statutory direction, dispose of such a case? To Posner, there is only one answer: the court must consider the impact of its decision. That is, if a court were to, for instance, truncate a complainant's right to reasons or a fair hearing, the question to answer might run thus: how might such a ruling impact on the citizenry's ability to hold government accountable? Answering this question involves a factual projection – that is, an assessment of potential consequences. And the natural discipline to which one might turn to for a meticulous answer might be political economy. Let me say that this consequence-based

⁷ Ibid at 41.

⁸ Ibid at 40.

⁹ Ibid at 230.

analysis can take place in different ways. It may be express whereby the court clearly relies on impact projections by competent experts. Or, it could be implicit in the sense that the deciders obfuscate their actual, extra-legal bases by pretending that existing provisions cover novel questions. But however it takes place it can only be the case that it happens. An existing rule may fail to address some problem. The deciding court adds to, amends or flat out creates law to cure or ameliorate that problem. In doing so, the court considers real-world consequences.

With the abovementioned points about legal decision-making in mind, I turn to Fuller's views on adjudication. Why? I do so because his account makes it clear why justices should be clear about the nature of and need for pragmatism in order to do their jobs which involve enabling the effective disposal of cases.

To Fuller, adjudication is a kind of social ordering.¹⁰ By social ordering, he refers, roughly, to ways in which relations between people are regulated.¹¹ He proposes that in order to understand adjudication within the conceptual framework of social ordering, we should do two things: (a) understand two goals of social ordering (namely organisation by *common aims* and organisation by *reciprocity*) and (b) understand adjudication as a distinctive form of social ordering.¹²

Organisation by common aims, in very straightforward dimensions, takes place when, for instance, two people who want to achieve the same goal come together.¹³ Organisation by reciprocity – again, in uncomplicated terms – occurs when, for example, two people, each of whom wants something the other has, come together to trade.¹⁴

¹⁰ Fuller L. 'The Forms and Limits of Adjudication' (1978-1979) 92 *Harvard Law Review*

¹¹ *Ibid* at 357

¹² *Ibid* at 357-362.

¹³ *Ibid*.

¹⁴ *Ibid*.

As species of social ordering, common aims organisation speaks to elections whereas reciprocal organisation goes to contracting.¹⁵ For instance, if two or more people agree that corporate tax rates are too high to promote commercial competitiveness, they will pursue the common aim of getting the rates lowered by voting for the same low-tax electoral party. They pursue their common aim. Or if two people come together and the first has something he's prepared to sell at a price his counterparty is willing to pay, they enter into a relationship wherein each receives the value he wants. They pursue a reciprocal relationship. In terms of the modes of participation that they involve: people participate in elections by voting whereas people participate in contracting by negotiating.¹⁶

But what makes adjudication a distinctive form of governing relations between people? What makes it a species of social ordering unto itself? Fuller argues that the goal of adjudication is to resolve disputes.¹⁷ That is, where people hold conflicting views (be it competing interpretations of a contractual term, or whether a constitutional provision should be understood so broadly as to contemplate a right not expressly enumerated therein), a decision-maker must decide in some party's favour. The mode of participation which this type of social ordering involves is neither voting nor negotiation. Rather, interested parties participate therein by presenting proof and reasoned arguments.¹⁸ They are not after the same goal. And they are not seeking to trade. Each seeks to win at the other's expense by showing, through an exercise in rationality, that the other does not have a sufficiently tenable case. Further, another feature which distinguishes adjudication from the other forms of social ordering is that it loses its character if it ceases to be rational – whereas the same cannot plausibly be said of the other two sorts of ordering. And it is the centrality of proof and argument that renders adjudication rational.

Of course, the term “proof” is particularly important. People avail themselves of this distinct form of social ordering by trying to prove reasonably certain things. This point, I would argue, implies that law loses its character when deciders have especially wide discretionary powers. If they do, litigants cannot know, with reasonable clarity, what to prove

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid at 363.

and the directions in which to steer their reasoning. They are unable to participate in the ways that give law its nature as a kind of social ordering.

Fuller informs us that David Hume initiated the train of thought that human reasoning operates in two areas: (1), ‘empirical fact’; (2), ‘logical implication’.¹⁹ That is, people either observe facts and test theories against what their endeavours turn up. Or they follow the logical implications of premises upon which they agree.²⁰

But to Fuller, there is a third approach. On this approach, one identifies a general purpose. (And, by purpose, I mean the underlying social, political, economic or, increasingly, environmental goal.) Then on a case-by-case basis that purpose is clarified and defined.²¹ It is done so through the identification of competing or related considerations.²² One might think of how the notion of due process (a standard against which laws could be reviewed) could be developed. Initially, due process could be understood to be a purely procedural safeguard. The basic question is: were the affected persons given a chance to participate meaningfully before the law was passed? Overtime, this question could lead to due process developing an increasingly substantive dimension. Or, in a question: if a constitution recognises that people are equal, then even if a majority’s will is ascertained by procedurally unobjectionable means, if the resultant law countenances racial discrimination, can one really say it comports with the idea that one cannot be deprived of freedoms without due process? In this way, the purpose of protecting people by means of a due process entitlement becomes more nuanced over time.

But how does this process of defining purpose over time take place? What informs the ‘amendments’ to purpose that individual judges come up with? Drawing from Posner, it seems that if judges themselves are not reasonably clear about what they are reaching for, they could well end up reaching for their own untested assumptions. And doing so not only

¹⁹ Ibid at 379.

²⁰ Ibid.

²¹ Boudin M. ‘Judge Henry Friendly and the Craft of Judging’ (2010) 159 *University of Pennsylvania Law Review* at 3-4.

²² Fuller (note 9 above) at 381

renders law vulnerable to the sorts of features that should be anathema to jurists, it is destructive of laws fundamental character as a form of social ordering.²³ That is, if judges are in fact amending purposes of laws by reaching for their personal biases, then they are not giving participants adequate chances to present proofs and reasoned arguments.

Legal materials (for instance, case law) to which judges turn for guidance when called on to resolve disputes run out when the jurists are confronted with novel or close-run issues.²⁴ At such times the judge typically goes for that result which, in her view, is best for society – that is the purpose.²⁵ But in developing rules to achieve this general purpose of social betterment, she must look to stores of information beyond the traditional repositories that lawyers know such as previously decided cases, statutes and written constitutions.²⁶

Posner argues that judges risk reaching for their biases and received, untested wisdoms if they are not candid about law's indeterminacy. The better course seems to be to (a) accept that legal materials like case law obviously cannot cover new issues; (b) that this denotes that laws necessarily develop with the benefit of 'outside' information and that law simply cannot be an autonomous discipline and (c) that if judges truly wish to limit the actual (and not just the frankly acknowledged) sphere of their discretionary powers, they should admit to what Posner calls the decline of law as an autonomous discipline and learn more about other disciplines that are relevant to law such as economics.²⁷ I largely agree. If judges learn enough about such fields to appreciate the depth and complexity of the considerations that inform their decisions, they can limit the influence of their personal partialities and bolster the influence of proof and reasoned arguments. And they could pursue the purpose, and preserve the nature, of adjudication as a form of social ordering more effectively.

So, what we have are two pressures that run in opposing directions: the need for reasonable clarity and predictability so that law retains its character. And, the need for

²³ Posner (note 2 above) at 766-770.

²⁴ Ibid at 766-770.

²⁵ Ibid at 258.

²⁶ Ibid at 766-770.

²⁷ Ibid.

deciders to appreciate the actual stores of information they reach for when existing law proves insufficient. The question becomes: how to bring those two opposing pressures into alignment? As a kind of preliminary answer to the fuller conclusion I will capture later, let me say this: the process of reconciling these opposing directions is at the heart of responsible, suitably restrained, pragmatic deciding. Judges should consider consequences of their decisions and, more generally, the rationales on which they predicate their decisions with reasonable clarity to enable litigants to gauge the confines within which they can try to win over the court. In other words – and to tie this point to my central position: I would argue that pragmatic adjudication is necessary and unavoidable. However, to be responsible, it must strive to satisfy certain requisites. First, it must not destroy law's nature as a means of controlling human relations. Second, it must not obscure the separation of powers so much that justices run excessive risks of encroaching on terrains best left to other governmental arms. The basic idea that unifies these two points is that overbroad judicial discretion – by which I mean discretion so wide that it (a) subverts law's character to the extent that unelected officials rule by near-sentiment and (b) oversteps the separation of governmental powers that justices usurp powers – is decidedly undemocratic.

So, drawing from Posner and Fuller, one might understand the process of adjudication, and its relationship to legal development, thus: it is a decision-making process that is grounded in reasoned argument. That argument is focussed by parameters that are clear enough to guide litigants in their preparations by suggesting, but not necessarily starkly delineating, the outer limits of judicial discretion.

Form, purpose and limitation in pragmatic adjudication

Adjudication in South Africa is methodologically defective – here I am referring to problems regarding *how* our judges seem to appreciate their jobs. And, it appears that a potential consequence of their, with respect, somewhat nebulously conceived methodology is that we could suffer courts that tend to undermine the stabilising quality of court-ordered dispute resolution that other agents in democracies cannot provide – which, as the well-worn

point runs, undermines judicial legitimacy. Another potential consequence is the negation of democracy.

Let me spell out my position in more detail: there is, in a methodological sense, much that is unflattering about South African public law adjudication. In brief: our judges do not seem to understand adjudicative form, purpose and limitation with sufficient rigour.²⁸ And I would argue that this collectively tenuous grasp of form, purpose and limitation in adjudication has given rise to a somewhat unworkable approach to (i) preserving law's character as a kind of social regulation and (b) keeping powers separate in our constitutional framework. It may turn out that as a result of this lack of workability, judicial authority tends to be a factor in our democracy that inspires volatility when really the converse should be true.

By form, purpose and limitation – the three pillars upon which I argue adjudication ought to rest if judges are earnest about keeping their business honest and efficient – I refer to the content I set out above – albeit in a more focused sense because I mean to use the *form*, *purpose*, *limitation* paradigm as a test against which to consider the Constitutional Courts performance below. By *form*, I mean adjudication is a kind of social ordering that is defined by the capability of interested parties to present proofs and arguments to arbiters in order to reach resolutions of disputes that accord with the rule of law.²⁹ Judges should do their work, not by mere factual observation or logical implication, but by mapping out implications of purposes to promote refinement.³⁰ Given this decidedly judicial nature of reasoning, it follows that the judge's staple (which is obviously the law) cannot be seen as an autonomous discipline – meaning that they should accept that the traditional tools of their trade³¹ can and do run out and that in such instances of indeterminacy (when existing rules do not provide

²⁸ In discussing form in adjudication, I draw heavily from a piece written by the late Professor Lon Fuller – see Fuller L. 'The Forms and Limits of Adjudication' (1978-1979) 92 *Harvard Law Review*. And in discussing purpose and limitation, I make extensive use of the two works by Judge Richard A. Posner – being Posner R. 'How Judges Think' (2008) and Posner R. 'The Decline of Law as an Autonomous Discipline' (1986-1987) 100 *Harvard Law Review*.

²⁹ Fuller, (note 9 above) at 357.

³⁰ Ibid at 381.

³¹ Here I refer to materials such as case law, statutes, written constitutions and customs.

clear-cut guidance) they should be willing to draw from other disciplines.³² But they should map out implications of their findings so as to reign in the scope of what litigants may consider – this, I would argue, necessitates judges acknowledging the actual, extra-legal disciplines from which they draw – thereby promoting sharper argument, greater guidance of litigants and a reduction of the extent to which judicial sentiment masquerading as sober impartiality can gather momentum in our constitutional democracy. Judging by the cases I will consider below, our Constitutional Court justices depart from this model.

On the topic of *purpose*: I argue that the basic purpose of the law is to achieve social ends and that the law's ability to do so turns largely on how willing judges are to embrace pragmatism – to accept, as Mr. Justice Oliver Wendell Holmes advocated, that the law's life blood has been experience.³³ That is, what ill (be it social, political or economic) does the law seek to rectify or at least mitigate? As suggested above, it is in the consideration of purpose that other informing disciplines become relevant to the justices. They should avoid conjecture as far as possible and they can do so by turning to disciplines that can offer them greater insights into the contexts that their holdings will control. I would argue that our justices have shown themselves unclear about the extent to which they step into broad waters in novel or hard cases. They guess at ends and draw what are essentially policy prescriptions from remarkably fuzzy generalisation which betray a fundamental underestimation of what they are doing.

And to turn to *limitation*: for the time being I will say that not only should judges be candid about non-legal repositories of knowledge for which they reach when developing their views and, in hard cases, seek clarity in extra-legal disciplines about the social evils they seek to cure or ameliorate, the courts should understand their capacities and limitations to act within the framework of their roles in society and the separation of powers.³⁴ Why? Because their self-denial comes with a price – and the price is that it makes it easier for them to be

³² Posner, (note 2 above) at 766-768.

³³ Holmes O. 'The Common Law, lectures' (1881)

³⁴ Courts should also be mindful of the relative competence of other bodies to dispose of issues. That is, courts should accept the need for pragmatism. But they should exercise restraint not only because preserving law's character and maintaining the separation of powers are desirable. They should, in addition, do so because other bodies have greater resources in terms of expertise and experience to appreciate and handle issues.

swayed by their personal biases and to inject those partialities into their decisions.³⁵ And in giving in to such inclinations, they would do no favours for the constitutional structure they are obliged to safeguard within the confines of their governmental powers.

In the cases I examine later it becomes clear that the Constitutional Court misconstrues the nuts and bolts of adjudication in hard cases – cases that are hard in that they reflect either competition between interests or room for evaluative, discretionary work.

Separation of powers

I will divide this section into five passages. First, I will offer a general definition of the “separation of powers”. Second, I will outline its historical development with a view to illustrating the circumstances that denoted its potential desirability. Third, I will argue that it is a conceptually defective term in as much as it is notionally fragmented and wants for a unified theory. Fourth, I will discuss the term’s basic meaning in the South African context. Fifth, I will show how this discussion ties into a central claim in this paper: that courts should adopt a cautious and restrained approach to pragmatic decision-making given that the separation of powers context in which they operate already makes for uncertainty, and courts should be acutely aware that they imperil core tenets of our constitutional order – and the nature of legal ordering – by recognising over-broad discretionary mandates. I will also bring up a few points about the how legal rules are developed in the common law tradition with an eye toward characterising, and criticising, Constitutional Court public law adjudication as resembling too closely the common law variety and thereby contributing to adjudicative methodology that endangers the nature of legal ordering in our jurisprudence.

³⁵ Posner, (note 3 above) at 176-177.

A broad definition

The separation of powers refers to a system of so-called checks and balances that aims to preclude governmental tyranny.³⁶ Political and legal authority is distributed between different institutions – the courts, legislature, executive and various other pieces of constitutional or governmental furniture – that wield different – although, at times, near-indistinguishable – powers so that no one body enjoys a concentration of power so robust as to threaten autocracy.³⁷

Historical development

The writings of Plato and Aristotle reflected the notion that governmental powers should be kept apart in so far as they sought to include three distinguishable classes in politics: aristocracy, monarchy and citizens.³⁸

This three-class governmental framework developed into a class-based order in early modern England involving the crown, House of Lords and House of Commons – a so-called ‘balanced constitution’ characterised by ‘mixed power’ and the ‘rule of law’.³⁹ Britain, though, abandoned separate powers with the appearance of the supremacy of the Commons in the eighteenth century.⁴⁰

A French aristocrat, Baron de Montesquieu, tried to sooth arbitrary royal autocracy in his native country.⁴¹ In 1748 he argued that England’s unwritten constitution separated powers between the legislature, executive and courts, and that legal bounds on the each branches authority conferred each the limited ability to reign in the others.⁴² It deserves mention that while Montesquieu presented a view that gained widespread recognition in America, it did not offer a comprehensive definition of a system of checks and balances or jettison class-based governance.

³⁶ Seedorf S. and Sanele S. ‘Separation of Powers’ in *Constitutional Law of South Africa* Chapter 12 at 3.

³⁷ Brisbin R. ‘The Judiciary and the Separation of Powers’ (2005) *The Judicial Branch* at 89.

³⁸ *Ibid* at 90.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

⁴² *Ibid*.

The American Revolution gathered from a combination of features – including English common law, confidence in the rule of law and Montesquieu – to construct the American constitutional order.⁴³ But the American case reflected a significant departure from the European model of significant political sway residing in a privileged class. Some revolutionaries believed that a sovereign people, rather than a privileged class, would govern and through that inclination, the notion of popular sovereignty gained a foothold.⁴⁴

This notion of popular sovereignty, and, by extension, freedom from tyranny, faced two dangers: first, the populace itself might have supported a despot. The second – which is relevant to this paper – was that public officials tyrannise the people.⁴⁵

Thus the Americans sought to decentralise power – on the understanding that the concentration of power would give rise to despotism. And they did so by dividing powers – albeit, at times, somewhat nebulously defined powers – between three arms of government. Brisbin outlines the three assumptions in which one of the framers, James Madison, grounded his support for the separation of powers:⁴⁶

First, because of their “fallen” status – the Judeo-Christian conception of human nature – mankind’s virtue too often gave way to unpredictable passions and interests neglectful of the liberties of others. Second, to channel human nature to serve the common good, the legal restraint of conflict among political interests could be achieved by the creation of separate and distinct departments. Third, political practices built into the Constitution would sustain restrained interbranch conflict. One practice was to prevent the unified support of officeholders for despotism by creating differences in “personal motives.” The practice was to ensure that, “Ambition must be made to counteract ambition.” The Constitution fostered such conflict by the creation of different duties for departmental officers and selection processes designed to energise officials to satisfy the sentiments of their diverse constituencies. Additionally, “constitutional means” or rules blending powers and instituting checks and balances would provide

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid at 93.

officials the opportunity to thwart despotic acts by officers of the other branches. It would necessitate the exercise of the virtues of dialogue, accommodation, and compromise.

The American Constitution does not define the separation of powers, opting instead for ill-defined competencies. But it is possible to glean from the three-branch framework a helpful – if fairly vague – appreciation of what it means for those branches to check and balance each other. The branches can seek to define their powers by blaming other branches for overreach, poor judgement, conceptual errors and other misuses of authority. They can also, to limited extents, undo actions by their counterparts in other branches.

A conceptually defective term

The term ‘separation of powers’ has often been marked by ‘its inconsistency and lack of synthesis’ – meaning it has never quite achieved unification in general theory.⁴⁷ That is, scholarship in the area has broken down into clusters. Three such clusters run as follows: (1) a scholarly set concerned with controversies and dynamics between branches; (2) a set occupied by political consequences of the separation of powers and (3), a set which looks at the purpose for delineating governmental powers.⁴⁸

More specifically: the first set may concern itself with questions about how the different branches limit each other – examples of limiting means include legislative vetoes by executives to block bills from becoming laws or constitutional amendments by legislatures to undo deeply unpopular judicial rulings. The second set might consider how the relationships between branches engender political outcomes – for instance, a court may decide an issue in a certain way with a view to avoiding conflict with another branch of government. (As it happens, certain constitutional remedies in South African law such as suspension of invalidity seem geared toward avoiding such tension.) The third set may ask: what goals are made possible (or at least more feasible) by dividing powers?⁴⁹

⁴⁷ Peabody G. and Nugent J. ‘Towards a Unifying Theory of Separation of Powers’ (2003) 53 *American University Law Review* at 2-3.

⁴⁸ Ibid at 2-5.

⁴⁹ Ibid.

Each of these sets tries to cover important terrain, and that goes to the problem: each research agenda, while desirable, is impoverished in as much as it discounts the highly germane inquiries pursued by the others. The idea, for example, that one can fully ventilate the separation of powers by looking at the political outcomes it drives sans some purpose against which to judge those consequences is a dubious proposition.

Separation of powers in the South African Context

I will address two questions here. First: how might one understand the separation of powers in South African law? Second: given the nature of the separation of powers, why, in hard cases, might it be difficult to gauge the point at which courts overreach with sufficient precision to adequately guard against unattractive consequences thereof?

Understanding the separation of powers in South Africa

South African constitutionalism was grounded in the Westminster system before 1994, meaning that political power was concentrated in an elected Parliament.⁵⁰ Members of the executive were also members of the legislature and, coupled with a judiciary that could do precious little to correct courses charted by executive-legislature unification, South Africa did not have a framework that constituted a system of effective checks and balances.

In addition, toward the end of the apartheid regime, the executive branch came to possess ever greater legislative power. In 1983, for instance, the ‘tricameral’ Constitution vested ultimate power in the executive arm – a development that consolidated the reality that the executive was able to manipulate the legislature.⁵¹ The President, under that structure, could, for example, designate a matter an ‘own affair’ of a group in the population.⁵² In doing so, the President was able to choose the legislative mechanism to be used in enacting legal provisions that covered the issue. The *First Certification Judgment* put it thus:⁵³

⁵⁰ Seedorf S. and Sanele S. (note 35 above) at 16.

⁵¹ Ibid at 12-17.

⁵² Ibid.

⁵³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 6.

At the same time the Montesquieuan principle of a threefold separation of state power – often but an aspiration ideal – did not flourish in a South Africa which, under the banner of adherence to the Westminster system of government, actively promoted parliamentary supremacy and domination by the executive. Multi-party democracy had always been the preserve of the white minority but even there it had languished since 1948. The rallying call of apartheid proved irresistible for a white electorate embattled by the spectre of decolonisation in Africa to the North.

The drafters of South Africa's Interim Constitution appear to have favoured the separation of powers doctrine. But the Interim Constitution did not mention the term. However, the structure of that constitution – a configuration which conspicuously avoids concentrating power in any one branch – denotes a division of powers. Additionally, the Constitutional Principles – which acted as a benchmark for the Constitutional Assembly in drawing the Final Constitution – entrenched the separation of powers in Constitutional Principle VI.⁵⁴

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

The drafters understood the separation of powers in a somewhat nebulous, purposive sense – seeing it as a means to effective governance. That is, decentralising power, the fledgling egalitarian democracy could avoid the development of a self-serving governing class.⁵⁵ (There are, of course practical impediments to effective separation of powers – including, for instance, a fused executive and legislature answering to handpicked, executive-friendly courts.)

The separation of powers principle is not specifically set out in the Constitution's text.⁵⁶ As a consequence thereof, the *First Certification Judgement* makes clear that our law does not recognise a rigid, bright-line separation of powers doctrine and that, essentially,

⁵⁴ Seedorf S. and Sanele S. (note 35 above) at 18.

⁵⁵ Ibid.

⁵⁶ Ibid.

much is left to interpretation.⁵⁷ Any understanding of the separation of powers must draw from the Constitution's text and the constitutional system in question. Our Constitutional Court demonstrated support for this approach by citing Harvard Law School professor, Lawrence Tribe.⁵⁸

We must therefore seek an understanding of the Constitution's separation of powers not primarily in what the framers thought, nor in what Enlightenment political philosophers wrote, but in what the Constitution itself says and does. What counts is not any abstract theory of separation of powers, but actual separation of powers '*operationally defined* by the Constitution.' Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separation of powers, but that might not in fact have found their way into our Constitution's structure.

Further evidence of support for Tribe's approach in our jurisprudence can be found in *De Lange v Smuts NO & Others*:⁵⁹

(O)ver time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest... That is a complex matter which will be developed more fully as cases involving separation of powers issues are decided.

⁵⁷ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 110-111.

⁵⁸ Seedorf S. and Sanele S. (note 35 above) at 21.

⁵⁹ *De Lange v Smuts* 1998 (3) SA 785 (CC) at para 60-61.

And additional support for this approach can be found in a different passage in *First Certification Judgement*.⁶⁰

Within the broad requirement of separation of powers and appropriate checks and balances, the (Constitutional Assembly) was afforded a large degree of latitude in shaping the independence and interdependence of government branches. The model adopted reflects the historical circumstances of our constitutional development. We find in the (Constitution) checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable, executive. A strict separation of powers has not always been maintained; but there is nothing to suggest that the (Constitutional Principles) imposed upon the (Constitutional Assembly) an obligation to adopt a particular form of strict separation, such as that found in the United States of America, France or the Netherlands.

Tribe acknowledged that the textual paradigm will prove insufficient at times. Thus interpretation will have to do the work of determining the distribution of powers and functions where the text, of itself, does not provide clarity.⁶¹

Sometimes, however, it will be necessary to extrapolate what amounts to a blueprint of organisational relationships from the fundamental structural postulates one sees as informing the Constitution as a whole.

The Final Constitution vests the authority to legislate within Parliament.⁶² (It is noteworthy that the Constitution contemplates legislative authority at three levels of

⁶⁰ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 112.

⁶¹ Seedorf S. and Sanele S. (note 35 above) at 21.

⁶² *Ibid* at 22.

government – national, provincial and local – but for the purpose of considering a division of powers between different branches of government, I will confine this discussion to the national sphere.)

The text does not offer a definition of legislative authority. But s 44(1) denotes that such authority requires certain powers: the power to make laws, amend the Constitution and delegate legislative powers to legislative bodies found in other governmental spheres.⁶³

The Final Constitution vests executive authority in the President and Cabinet in terms of s 85. The executive's role, broadly stated, involves responsibility for developing, preparing and implementing laws and policies, and coordinating the administration.

While one can readily distinguish between the executive and legislative branches within the South African context, the Constitution does allow for executive participation in legislative matters in that it lets Cabinet members introduce legislation in Parliament.⁶⁴ Moreover, legislation prepared by Parliament does become enforceable until the President attaches his signature, thereby making laws of bills.

Section 165 of the Final Constitution vests judicial authority in the courts.⁶⁵ This section provides that the courts are to apply the Constitution and the law 'impartially and without fear, favour or prejudice'. Additionally, the section also provides that other organs of state must take steps to ensure that the courts enjoy, among other things, 'independence' and 'impartiality'.⁶⁶ From this arrangement it is clear that the Constitution envisions the separation of judicial authority from the other arms of government, even contemplating that the other arms take positive steps to guarantee that division. And the Constitutional Court has

⁶³ Ibid.

⁶⁴ Ibid at 23.

⁶⁵ Ibid at 25-26.

⁶⁶ Ibid.

underscored the necessity of the judiciary carving out and retaining a separate sphere of governmental competence:⁶⁷

The separation of the judiciary from other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the Courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures... Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public powers are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.

Let me say that a basic idea underpinning our constitutional order is democratic governance that provides healthy protection of minority rights. Roux argues that the democratic principle in South Africa is more nuanced than simple majority rule.⁶⁸ He contends that it makes sense to think about democracy – and the separation of powers – in South Africa in terms of ‘constructive tension’.⁶⁹ That is to say: the general idea is for laws to reflect majority will. But courts are empowered to frustrate majority will if majoritarian dictates overrun constitutionally protected rights. The judiciary, legislature and executive must coexist in the knowledge that conflicts are inevitable. It goes without saying (perhaps it is even a trite point) that judicial review (be it of administrative action, non-administrative instances of public power and especially constitutionality reviews of legislation) is a significant competency. It is necessary but decidedly undemocratic. I would argue that given the potentially far-reaching nature of such judicial power, courts should conceive of and follow sharper, more scientific approaches to employing it.

⁶⁷ *South African Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC) at para 25.

⁶⁸ Roux T. ‘The Principle of democracy in South African Constitutional Law’ (2008) *Constitutional Conversations* at 82.

⁶⁹ *Ibid* at 82.

Generally, South African jurisprudence, recognising that strict separation of powers is impractical, has sought to maintain a meaningful division of powers by resort to the notion of a ‘pre-eminent domain for each branch of government’:⁷⁰

The principle of re-eminent domain signifies that there are certain functions and powers that fall squarely within the domain of one or the other branch of government. Within this domain, interference or involvement by another branch cannot be justified as ‘checks and balances’, but must instead be treated as unconstitutional intrusions. The principle of pre-eminent domain, in other words, emphasises the separation of functions and limits the attribution of certain powers to the ‘wrong’ institution.

In keeping with the basic treatment of the separation of powers reflected in this paper, let me say that the concept of pre-eminent domain is functional rather than formalistic. That being said, the courts have fleshed out something of a test for determining whether a power or function falls within one branch’s pre-eminent domain.⁷¹ The court will consider the distinctive function of the branch in question against the other branches. This approach cannot dispose of hard cases if by disposition one envisages a justice employing a relatively narrowly construed discretionary mandate. But it has gained acceptance in South African jurisprudence.⁷²

Parliament has a very special role to play in our constitutional democracy – it is the principal legislative organ of the State. With Due regard to that role, it must be free to carry out its functions without interference. To this extent, it has the power to ‘determine and control its internal arrangements,

⁷⁰ Seedorf S. and Sanele S. (note 35 above) at 39.

⁷¹ Ibid at 40.

⁷² *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) (CC) at paras 36 -37.

proceedings and procedures'. The business of Parliament might well be stalled while the question of what relief should be granted is argued out in the courts. Indeed the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the separation of powers. The constitutional principle of separation of powers requires that other branches of government refrain from interfering in the parliamentary process.

Pre-eminent domain is, I would contend, a very useful mechanism. But arguably, it does little to guide litigants in their preparation, and little to restrain courts in their deliberation, in hard cases.

Relevance to preserving law's character as a social ordering mechanism

The mix of a vague separation of powers doctrine and necessarily pragmatic adjudication denotes that justices could very easily reach (perhaps even unknowingly) for extra-legal bases when deciding cases. And, if they are unclear about what they are doing, they could decide cases by shifting the goal posts, as it were. In other words, if courts do not acknowledge insufficiently clear limitations on what they can and cannot do in adjudication, they undercut advocates' abilities to present arguments. Litigation becomes more a game of teasing out the sensibilities of the presiding officers rather than the species of social ordering for which Fuller argued. And, it is precisely the receptiveness to reasoned argument (rather than near-whim) that gives law its essential character.

Appellate courts pronounce on hard issues. They have such jurisdiction and hard issues that yield contestable holdings in first instance scenarios are precisely the sorts of issues that are tested repeatedly. Niblett, Posner and Shleifer argue that (a) appellate courts exercise considerable discretion and (b) that their decisions are often unpredictable and inefficient.⁷³ The authors confine their discussion to private common law. But their cautionary is noteworthy here. They argue that common law legal rules evolve by appellate courts making pronouncements.⁷⁴ This point will make immediate sense to anyone loosely familiar with the Anglo-American tradition. But they argue that this process, judging by data they considered, does not, concededly in private common law contexts, lead to a convergence toward efficiency. (They understand efficiency as outcomes that market discipline would produce.)⁷⁵ I would argue that this cautionary note should give pause to any judge exercising discretionary power. That is: with respect, judicial rigor is often not especially rigorous – if we take rigor, as I believe I suggest throughout this paper, to involve keen appreciations of the limits of judicial capacity; the actual repositories of knowledge that control outcomes in hard cases and the fragility of the concepts that keep governmental powers separate and thereby ensure responsible democratic governance rather than the insidious development of rule by unaccountable justices.

Instances of adjudicative overreach by the Constitutional Court

I will discuss two fairly specific ways in which the Constitutional Court has opted for too broad a conception of its decision-making discretion – thereby undermining laws function as a predictably pragmatic form of social ordering geared toward dispute resolution on the strength of proof and rational argument and blurring the line between courts and legislatures. The first concerns the development of the principle of legality in the context of administrative law. The second involves the Court's approach to bill of rights litigation. In large measure, both grievances go to the idea that the Constitutional Court's actions amount to power-grabs – expansions of judicial province through acquiring greater, even strikingly wide, discretion. That is, the court was not serious enough about form, purpose and limitation.

⁷³ Niblett A. Posner R. and Shleifer A. 'The Evolution of a Legal Rule' (2010) *Journal of legal Studies* at 355.

⁷⁴ Ibid at 325-326.

⁷⁵ Ibid.

Objection to the development of the principle of legality

I will explain myself thus: I will look at a deficiency in the Promotion of Administrative Justice Act ('PAJA').⁷⁶ I will discuss why this deficiency is of a material nature. I will bring up why the courts sought to develop the principle of legality. I will discuss the content of the principle of legality. I will concede that there are some benefits to the principle. Lastly, I will argue that despite there being something of an upside, the justices should avoid the course that they appear to have chosen.

The PAJA's problematic threshold test and how the judiciary reacted thereto

Section 1 of the PAJA sets out the threshold test – which means that it contains a series of requisites that must be met before a matter will fall within the act's sphere of application.⁷⁷ Hoexter picks up neatly on two fundamental problems with this test which are that it is, for a start, over-narrow and secondly, that it is entirely too convoluted.⁷⁸

As regards its excessive narrowness: it limits the scope of conduct to which the PAJA can apply by touching on only that conduct that 'adversely' affects 'rights' and which has 'direct, external legal effect'.⁷⁹ Additionally, section 1 also reflects a list of explicit exclusions. Thus, speaking cumulatively, a good deal of conduct just is not hit by the PAJA.⁸⁰ And in the absence of some other store of principles that could be used to control behaviour untouched by the PAJA, the judiciary's ability to ensure constitutionally guaranteed governmental accountability would be prejudiced.

⁷⁶ Act 3 of 2000.

⁷⁷ The Promotion of Administrative Justice Act 3 of 2000.

⁷⁸ Hoexter C. "'Administrative Action' in the Courts" (2006) *Acta Juridica* 303 at 306.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

Moreover, the section 1 test makes for cumbersome intellectual exercises insofar as it is a lengthy provision and it contains a peculiar mix of elements – peculiar in that while some of the requirements go to substance, still others seem to speak to procedure.⁸¹ And as Hoexter perceptively reflects: the courts seem to have intimated dissatisfaction with the enquiry.⁸² How? There are apparently two ways in which judges have done so: first, some cases seem to suggest that judges expend most of their intellectual vigour in grappling with the threshold criterion and thereafter accord near-cursory attention to the actual grounds of review. Secondly, sometimes judges have even opted for different pathways to review quite possibly with a view to avoiding the PAJA's gateway enquiry altogether. And both judicial inclinations can lead to the underdevelopment of the grounds of review and, as I argue below, excessive expansion of judicial discretion.

Clearly the PAJA is quite misconceived. The trouble is that it stands more or less at the juncture between law and politics and thus it is hardly melodramatic to contend that the modern administrative state wherein we live probably cannot afford for the PAJA to be as bad as it is given the government of the day's capacity to affect the lives of the people who live in this country.

The PAJA comes up short in the modern administrative state

Davis takes a brief look at the development of legal thought and outlines three periods in that regard.⁸³ The first of those periods ran from roughly 1850 to 1914 and therein, a good deal of emphasis was placed on individual and property rights and people were quite hostile to the idea of governmental interference in their lives. In the second period (from around 1900 to about 1968), the familiar administrative state started to take shape and societies in the West saw governmental projects affect them to greater degrees. The third of these periods, which I will take from around 1968, saw the rise, at least in the West, of the human rights culture. As it happens, it is not hard to see that it is in this third period, perhaps the most basic

⁸¹ Ibid at 307 to 310.

⁸² Ibid.

⁸³ Davis D. 'To Defer and When? Administrative Law and Constitutional Democracy' (2006) *Acta Juridica* 23 at 24. Let me say, to maintain candour, that these time frames are approximate.

tension in administrative law started to become increasingly apparent: the tension between law and politics; between what decision-makers can and cannot properly do in pursuit of their objectives. In sum: the PAJA's failings do not help to foster accountability. Drawing from Mureinik's view on accountability: in a context wherein the state affects our lives greatly, there exists a significant need to see the state held accountable if need be – which means, at the heart of it, that government's decisions must be justified and if they are not, they ought not to stand.⁸⁴ The PAJA seems inadequate to the important function of fostering such accountability insofar as its gateway test makes it very difficult for courts to get to the very grounds that could promote such accountability. So it is somewhat understandable that an apex court would want to find some way to cure or at least mitigate a grave legislative shortcoming.

The principle of legality and how our courts have availed themselves of it

In our jurisprudence, the principle of legality controls non-administrative exercises of public power. Our courts regard it as being an aspect of the rule of law and thus the principle is grounded in the Constitution.⁸⁵ This means that this repository of public law principles represents a drastic departure from the notion of parliamentary sovereignty that underpinned roughly analogous principles in our pre-democratic past.⁸⁶ Why develop it? It is developed to ensure accountability when PAJA is unable to do so.

This principle of legality has been understood to be flexible enough to embrace an array of essentially pragmatic considerations. For instance, courts have read both procedural fairness and maybe even the giving of reasons into its content.⁸⁷

⁸⁴ Mureinik E. 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35 at 40.

⁸⁵ Pillay A. 'Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?' (2005) Vol 122 *SALJ* 419 at 421. *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 9CC at para 59

⁸⁶ O' Regan K. 'Breaking Ground: Some thoughts on the Seismic Shift in our Administrative Law' (2004) Vol 121 *SALJ* 424 at 429.

⁸⁷ Hoexter C. 'Law, Order and Liberty' *Essays in Honour of Tony Matthews* (2011) 55 at 56.

Moreover, the development of the principle of legality in our law seems to march in step (whether deliberately or coincidentally) with what appears to be a Commonwealth trend away from the English common law notion of unreasonableness.⁸⁸ Our courts have done so by (a) fixing rationality as a feature of the legality principle and through (b) suggestions that proportionality will enter into the equation.⁸⁹

What is wrong with our common law heritage, have other jurisdictions similarly indebted to English law noticed, and how is it that the concept of proportionality addresses the problem?

Our common law heritage depicts a history of judicial inability to ensure enough accountability which derived, in substantial measure, from an overly executive-friendly conception of administrative justice. Additionally, I think jurisdictions that share our Anglo-legal history see this problem. The general recognition of a problem that can have grave social consequences can be seen as bolstering the case for limited, predictable pragmatism.

The *Wednesbury* case has served as perhaps the seminal statement of the common law test for reasonableness of administrative action.⁹⁰ Its treatment clearly appreciates the basic risk that courts run when undertaking review for reasonableness: that judges may stray from review to appeal; advance, as unelected officials, their own policy preferences and thereby usurp functions that are not properly theirs.

Why should reasonableness review present this danger? The classic answer to this question is pretty much that such review renders a close study of the merits of a decision unavoidable.⁹¹ That is certainly not untrue: that is, a blunt distinction between review and appeal is that on the former, one appraises the process whereby a decision was taken whereas

⁸⁸ Felix S. 'Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka' (2006) *Acta Juridica* 95.

⁸⁹ Hoexter, (note 87 above) at 56.

⁹⁰ *Associated Provincial Picture Houses LTD v Wednesbury Corporation* [1948] 1 KB 223 at 229. This is certainly a historically significant case but Felix (note 88 above) outlines convincingly that the English courts have come to find significant fault with the doctrine set out in this famous decision.

⁹¹ Hoexter, (note 78 above) at 316 to 317.

on the latter, one looks at whether out of at least two, but possibly a multiplicity, of potential decisions, the taker thereof took the right one – and consideration of reasonableness tends perilously close to the latter.

This Wednesbury approach is hardly unproblematic. One of those problems is that it reflects excessive judicial caution. In other words, it simply sets the bar for reviewability too high and thus incapacitates a reviewing court from granting relief in instances that show questionable, if not grossly unreasonable, administrative behaviour.⁹² And I would raise another problem here – one which is related to the first-mentioned one: while the Wednesbury paradigm implicitly concedes that reasonableness review involves scrutiny of the merits, it goes on to assume, wrongly I would argue, that the only way to maintain the divide between review and appeal is to set the standard for such challenges exceedingly high.⁹³ Fortunately, jurisdictions as geographically far afield in the Commonwealth as England, India and Sri Lanka have all (a) come to understand that the Wednesbury approach is regressive and (b) that a nuanced, pragmatic approach that considers bases, causality, goals and means is an altogether better approach to reasonableness review than the, with all respect, somewhat parochial qualms associated with much of the common law.⁹⁴

The South African experience with unreasonableness review at common law was largely a tale of excessive judicial deference to government.⁹⁵ Before the democratic era was introduced, our courts relied on the classification of functions when considering decisions taken on review and in the context of unreasonableness review, the courts recognised different tests for different classifications of administrative functions. That is, for ‘legislative’ acts, the courts recognised a reasonableness test; for ‘purely judicial’ acts, judges recognised a no reasonable evidence test and as regards ‘administrative’ acts, courts espoused the so-called test for ‘symptomatic unreasonableness’.⁹⁶

⁹² Chan J. ‘A Sliding Scale of reasonableness in Judicial Review’ (2006) *Acta Juridica* 233 at 235.

⁹³ Ibid.

⁹⁴ Felix (note 88 above).

⁹⁵ Hoexter C. ‘Administrative Law in South Africa’ (2007) at 294.

⁹⁶ Ibid.

As regards legislative acts, the courts, when entertaining challenges predicated on unreasonableness, were very executive-minded.⁹⁷ (Perhaps this was to be expected inasmuch as South Africa ran under the doctrine of parliamentary sovereignty and the courts would have been keenly aware of the ultimate repository of power in the country at that time.⁹⁸) Additionally, not only were the courts, for the most part, reluctant to set decisions aside given the constitutional system of the day, Parliament could simply authorise unreasonableness as well.⁹⁹ So, while administrative lawyers were at times quite a creative set when it came to manipulating and stretching principles to achieve more equitable ends, by and large, law and politics ran against them.

Purely judicial decisions could be set aside, as mentioned earlier, if no reasonable evidence warranting the holding of the tribunal in question was presented. The only point I will add hereto is that this enquiry was relaxed from the earlier test of ‘no evidence’ – obviously a more demanding standard.¹⁰⁰

The test regarding administrative decisions was quite different from the others. The relevant enquiry – that of symptomatic unreasonableness – essentially called on the reviewing court to consider whether the decision taken was so absurd as to suggest an objectionable mental state: bad faith, failure to apply the mind, ulterior motive.¹⁰¹

In the post-democratic era (the period wherein we all presently live), rationality is regarded as a central feature of legal principles or grounds that seek to control exercises of public power on bases specifically described as, or closely resembling, reasonableness.¹⁰² Thus reasonableness under section 33 (1) takes as its first principle the notion of rationality and the principle of legality is also closely associated with that concept.¹⁰³ In addition,

⁹⁷ Ibid at 296 to 297.

⁹⁸ Dyzenhaus D. ‘The Past and Future of the Rule of Law in South Africa’ (2007) *SALJ* 734 at 735 to 737.

⁹⁹ Hoexter, (note 95 above) at 297.

¹⁰⁰ Ibid at 301.

¹⁰¹ Ibid at 294 to 295.

¹⁰² Ibid at 307.

¹⁰³ The Constitution of South Africa Act 108 of 1996.

rationality is exhaustively endorsed in section 6 (2) (f) (ii) of the PAJA.¹⁰⁴ So it can only be fair to ask: what is meant by the concept of rationality? At the core of it, it means that the reasons offered and the evidence proffered in support of a decision must (a) actually support the decision and (b) be objectively capable of advancing the goal for which the decision was said to be taken and the power conferred.¹⁰⁵

To be sure, this notion of rationality equips courts with tools superior to anything they had in the pre-democratic era in South Africa. To the extent that judges can still accept that they do not have to personally favour decisions taken – even when available alternatives seem preferable to them – this element of rationality constitutes a significant step in the right direction. The trouble is that deciding a judicial review is not unlike conducting surgery: the physician may have both the best intentions and the correct analytical framework – but she still needs the right tools. I would argue – rather after the fashion of Commonwealth jurisdictions together with another jurisdiction that draws heavily from English law, Hong Kong – that rationality, as laudable an element as it is, is still insufficiently keen for the precision treatment that jurists might have to conduct to balance as well as possible administrative efficacy and accountability.¹⁰⁶ But proportionality appears to provide a missing ingredient.

The basic goal of resorting to the element of proportionality is to ensure that the adverse effects of a decision do not outweigh its beneficial consequences.¹⁰⁷ The consideration of proportionality encourages administrators to think comprehensively about the decisions they take – asking of themselves, for instance: ‘Can the goal in question – which meets the requirement of rationality – nonetheless be achieved by means that will result in less disruption?’

¹⁰⁴ Act 3 of 2000.

¹⁰⁵ Hoexter, (note 95 above) at 307.

¹⁰⁶ Chan, (note 92 above).

¹⁰⁷ Hoexter, (note 95 above) at 309 to 310.

Regrettably, this ground was not explicitly included in the PAJA.¹⁰⁸ However, it seems the section 6 (2) (h) can be interpreted to embrace it. O’ Regan J made a commendable effort in that regard in *Bato Star Fishing (PTY) LTD v Minister of Environmental Affairs*:¹⁰⁹

[T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.

I would not be surprised to see O’ Regan J’s effort stick. And in any event, there seems to be steady support for the applicability of proportionality to administrative law in jurisdictions such as England, India and Sri Lanka and thus the idea that embracing proportionality as a good idea seems to be regarded by many as a good idea.¹¹⁰

This development makes some sense. But the question is: how should courts, especially apex courts, construe the ambit of their discretionary power to pursue worthy social ends such as government accountability through doctrinal development?

The potential benefit and risk of developing the principle of legality

Noting that the principle of legality has been extended to encompass procedural fairness and the giving of reasons, Hoexter seems confident that it will inevitably come to cover proportionality as well. This strikes me as a fair assessment. And, to be sure, one could make a case that the courts ought to develop the principle because, as I have made out above, the PAJA’s threshold investigation detracts attention from the grounds of review – reasonableness being one of them. And it is, to my mind, the development of the grounds of

¹⁰⁸ Ibid at 311.

¹⁰⁹ 2004 (4) SA 490 (CC) at para 45.

¹¹⁰ Felix, (note 88 above).

review that will promote tolerable relations between citizen and state in motion; accountability and efficacy. And the courts, when they employ the PAJA are, for reasons I talk about earlier, not afforded particularly attractive chances to do so.

So there is something of a pragmatic case to be made for the development of the principle of legality. But what is the limiting factor? What constrains the justices to develop the principle? To put it candidly: there is no express basis in the Constitution's text for justices effectively usurping the drafters' intention. The PAJA is the constitutionally contemplated means to realise administrative justice. This means the courts must, largely, even mostly, confine their endeavours to working with the Act. The PAJA might well limit administrative justice. But justices undermine the character of law as a sort of social ordering when they appropriate the wide discretion used to develop the principle of legality as, effectively, an independent stream of doing the work they want the PAJA to do. That is, by signalling to litigants that if they are unhappy about the narrowness of patently relevant provisions, they might still ask the justices to ground alternative rationales in vagaries.

This endeavour of developing the principle of legality is accompanied by related risks. One such risk is that judges could end up ignoring, and thus violating, the constitutional framework of PAJA first, Constitution second. They may do so by merely assuming that a decision is controlled by the legality principle rather than the PAJA. That seems a power-grab. Justices do not like the sphere the rule of law affords them. So they opt for, arguably, an undemocratic course of expanding their power to influence society. Sunstein, in reviewing United States Supreme Court Justice Stephen Breyer's book, *Active Liberty*, neatly outlines the fundamental reproach of pragmatism that I suggest here.¹¹¹ He says Breyer essentially asks: what hat should a pragmatist justice wear? And he says Breyer answers thus: the justice should behave as a so-called reasonable legislator.¹¹² The trouble of course is that different justices could understand the idea of reasonable legislating differently. Or, the same justice could understand reasonableness differently under varying circumstances.

¹¹¹ Sunstein C. 'Justice Breyer's Democratic Pragmatism' (2005) *The Law School of the University of Chicago Working Paper* at 18 to 19.

¹¹² Ibid

Two Constitutional Court cases illustrate this point. The first case is *Masetlha v President of the Republic of South Africa*.¹¹³ The second is *Albutt v Centre for the Study of Violence and Reconciliation*.¹¹⁴

Masetlha concerned the constitutional validity of two decisions taken by the President: the decision to suspend and subsequently dismiss Masetlha as the head of the National Intelligence Agency (NIA). The President brought this about by unilaterally amending Masetlha's term of office, which caused it to expire without the chance for a hearing and earlier than it would have under the original term. The termination included an offer to pay Masetlha's full monthly salary together with certain benefits and allowances. Masetlha rejected the offers, condemned the decisions as invalid and sought reinstatement.

Ngcobo J's holding – in which Madala J concurred – was the minority view in the case. Ngcobo J recognised a relationship between rationality and procedural fairness and found, on that basis, that the principle of legality's rationality dimension brings procedural fairness within the doctrine's scope.¹¹⁵

To sum up therefore, when exercising public power the executive and other functionaries have a duty to act fairly. This is a requirement of the rule of law which requires that the exercise of public power should not be arbitrary.

Moseneke DCJ, writing for the Majority, held that the President did not have to grant the head of the NIA a hearing before terminating his employment.

¹¹³ 2008 (1) SA 566 (CC)

¹¹⁴ 2010 (3) SA 293 (CC)

¹¹⁵ *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) at para 189

Masetlha is important to this paper's discussion of over-broad judicial discretion – and its potential to subvert law's character – in that its minority view presaged the ruling in *Albutt*.

In *Albutt* case, the Court considered the President's power to pardon offenders under s84 (2) of the Constitution.¹¹⁶ In 2007, a special dispensation was announced under which people convicted of politically motivated crimes who had not applied for amnesty in the truth and reconciliation route could be pardoned. The Court had to decide whether the victims of offences had the right to be heard by the President before he decided to pardon or not.¹¹⁷ (The goal of pardoning was to promote reconciliation and nation-building, which goal was set out in documentation explaining the nature of the process. Relevantly, none of the documents denoted whether the victims were entitled to be heard.)¹¹⁸

The Court held that the victims were so entitled and it reached its decision through consideration, application and extension of the principle of legality:¹¹⁹

In these circumstances, the requirement to afford the victims a hearing is implicit, if not explicit, in the very features of the special dispensation process. Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, required, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which the pardons are based.

¹¹⁶ Ibid

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 72.

So, we have two cases that both dealt with the legality principle and whether it contemplated the right to be heard through rationality analysis. The courts reached different conclusions. Hoexter articulates the tension thus:¹²⁰

One other problem associated with the use of the principle of legality is particularly worth mentioning. This is that the supposed advantages of generality, simplicity and flexibility come with a built-in disadvantage: unpredictability. The point of a blank slate after all is that anything can be written on it. The PAJA, for all its problems, offers litigants some degree of certainty about what the requirements of administrative justice are and what circumstances will attract them. Even allowing for the fact that some of this is false certainty – the elements of the definition of administrative action are highly manipulable and contingent, after all – the statute goes into considerable detail about matters such as procedural fairness and the giving of written reasons. The principle of legality is far less nuanced and far less certain as to its content in particular cases. To put the matter starkly: how is a lawyer to know whether she has a *Masetlha* or an *Albutt* on her hands? The Constitutional Court has so far given no real clue in this regard. Eventually, one must suppose, enough jurisprudence will build up to provide a reliable guide, but that could take a very long time.

I have no notion whether Hoexter has read Fuller or Posner. But whether by background reading or acute observation she touches with a knife the nature of law as a social ordering mechanism and the difficulty that derives from taking pragmatism too far. I would argue that sharper, more forthright, analysis might have made a difference. The courts might have used *form, purpose and limitation* as a guide to their inquiries. That is: have we (the court) properly considered the extra-legal discipline that informs these legal considerations; have we identified the social ill we seek to relieve and, with reasonable specificity, have we identified how we may encroach on other governmental terrain and any steps we can follow

¹²⁰ Ibid at 67 to 68.

to reign in the sphere of our discretion? I share Hoexter's concerns about the Court's performance.

The national legislature may amend the PAJA. Or an enterprising litigant with a substantial war-chest could simply challenge the pertinent provisions in the law. But, in the meantime, the South African legal community is wasting time that could be devoted to giving content to the grounds of review. Working with the principle of legality affords judges the chance to promote accountability. It is a simpler, more general enquiry and therefore, it accords jurists greater opportunities to direct their energies to grappling with grounds of review and the overarching question in any case that engages reasonableness review or grounds analogous thereto: where, given the facts and factors in the instant case, does the court's jurisdiction end? But, again: this sort of influence-expanding behaviour speaks to the heart of the famous countermajoritarian difficulty and it can subvert law's nature. That is: the justices, by tacitly claiming wide powers to, effectively, develop an alternative repository of public accountability law to do the work the constitutionally mandate legislation appears to shirk, end up stepping into the legislature's shoes and if courts are not careful, they may do litigants a genuine disservice by failing to offer sufficient clarity. And, those justices run the risk of unduly broadening the ambit of their governmental influence.

Objections to the Court's bill of rights adjudication

General comments

Woolman brings up three cases. The first is *Barkhuizen*.¹²¹ The second is *Masiya*.¹²² And, the third is *NM*.¹²³ Woolman argues that these cases show, quite starkly, the Constitutional Court's tendency to produce result-based decisions devoid of analytical rigour

¹²¹ *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC)

¹²² *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC)

¹²³ *NM v Smith* 2007 (5) SA 250 (CC)

and sufficient respect for text.¹²⁴ That is, the Court, according to Woolman, refused to perform direct applications of the bill of rights, opting, instead, for analysis in terms of nebulous values. He said:¹²⁵

My assessment, for what it's worth, is that a penchant for outcome-based decision-making, and a concomitant lack of analytical rigour, has finally caught up with the Constitutional Court... Of Particular import is the court's persistent refusal to engage in the direct application of the Bill of Rights. Flaccid analysis in terms of three vaguely defined values – dignity, equality and freedom – almost invariably substitutes for more rigorous interrogation of constitutional challenges in terms of specific substantive rights found in Chapter 2 of the Constitution. If the drafters of the Constitution had intended such a substitution, the structure and the language of the Bill of Rights would have reflected that intention. It doesn't. Moreover, this strategy – of speaking in values – has freed the court almost entirely from the text, and thereby grants the court the license to decide each case as it pleases, unmoored from its own precedent. Our Constitutional Court sits as a court of equity: That, again, cannot be what the drafters of the Constitution intended.

His well-taken grievance is that the Court resorted to the values of dignity, equality and freedom to produce shoddy dispositions of cases instead of defining and employing the specific substantive rights that were at issue in the abovementioned cases.¹²⁶ And, by producing decisions that are unmoored from text, I would argue that the Court, in effect, appropriated a species of decision-making power that runs far closer to outright whim than any court should countenance regardless of how challenging the issues might be in the instant case. (Actually, the Court's performance in these matters is especially egregious in that the Constitution sets out steps to follow. In other words, there really can be no justification for departing from the express dictates.)

¹²⁴ Woolman S. 'The Amazing, Vanishing Bill of Rights' (2007) *SALJ* 762.

¹²⁵ *Ibid* at 762.

¹²⁶ *Ibid* at 763.

Let me just say, before delving briefly into two of the cases, that my points about pragmatism are consistent with Woolman's advocacy for text-based constitutional decision-making. Woolman advocates respect for text, not myth-based belief that the justices must never recognise law's indeterminate nature. Thus, in defining the scope of a right, the Court may ask after the purpose of the right and whether potential interpretations could conceivably cause, or help cause, the realisation of that purpose. So the Court's projection as to whether the Constitution's purpose could be promoted by an interpretation is consequence-based and, I would argue, pragmatic. Additionally, to the extent that the Constitution's limitations inquiry requires that a justifiable restriction is one that does not impose greater costs than benefits, it, too, is consequence-based and grounded in pragmatism.

Woolman's case analyses

I will go into two of the cases that Woolman brought up. I am going to leave out a discussion of *Barkhuizen* because the flaw it presents is of a nature with *Masiya's* shortcoming. *Nm*, on the other hand, raises a distinguishable failing.

In *Masiya*, a regional magistrate's court convicted Masiya for the anal rape of a young girl.¹²⁷ Before the case ran, the unlawful act in question only met the elements of indecent assault, not rape.¹²⁸ The magistrate found the common-law definition of rape wanting and broadened it by having it include the non-consensual insertion of a penis into the anus of a person regardless of gender. The High Court, on appeal, agreed with the magistrate on both the doctrinal development and the conviction.¹²⁹ The Constitutional Court's majority held that the definition of rape at common law (together with legislative definitions of rape) should be extended to include anal penetration because to avoid doing so would not be in keeping with the Constitution's spirit, purport and objects. (Disquietingly, the majority held

¹²⁷ Ibid at 766.

¹²⁸ Ibid

¹²⁹ Ibid

that including anal penetration in the definition of rape should apply only in cases involving female complainants.)¹³⁰

The problem that Woolman rightly identifies is that the Court, in rendering its ruling, simply bypassed the direct, substantive consideration of specific Bill of Rights provisions and engaged in a mere indirect, nebulous, values-based analysis:¹³¹

What is wrong with *Masiyai*? It never *truly* considers the direct application of the substantive provisions of the Bill of Rights to the challenged common-law rule regarding the definition of rape. It never engages the content of the substantive provisions of the Bill of Rights and thus never articulates constitutional rules that amplify the content. The entire analysis of the common law rule takes place within the rubric of s 39 (2) and in terms of indirect application.

At the risk of sounding rather strong, the Court's ruling evinces a somewhat capricious use of judicial power. In the end, when the apex court pronounces on constitutionality, it is very difficult to bring about a change in its finding. Thus, in many instances, the Court's holding might as well be the last word for the foreseeable future. It is a trite point but unelected officials should wield such power with humility. And, rigorous analysis – which involves close engagement with textual content – is one important way for deciders to keep themselves honest, and to preserve the way in which law orders relations.

In *NM*, the complainants averred that their privacy and dignity rights were breached because their names and HIV status had been published without their express consent. The High Court ruled against them. The Constitutional Court found in their favour.¹³²

¹³⁰ Ibid

¹³¹ Ibid at 768.

¹³² Ibid at 781.

Woolman articulates the problem with the Constitutional Court's conduct thus: despite its relatively narrow substantive jurisdiction, the Court did not engage in any sort of analysis of Bill of Rights provisions.¹³³ Instead, it treated the case as a garden-variety delictual suit.¹³⁴ By ignoring its own jurisdictional constraints, the Court expands its power beyond tenable bounds. That is, if the case turned on an application of ordinary principles of delictual liability, why did the court even bother to hear it? At the risk of sounding somewhat cynical, a plausible explanation is the court ignored the province carved out for it under the Constitution and, by means of a value judgment, took it upon itself to right a wrong it had no business entertaining. Woolman mentions that the Court almost tried to mask the fact that it strayed outside its substantive jurisdiction. It did so by way of what one can only describe as a vague suggestion of constitution relevance.¹³⁵

The applicants approached this Court with the view to vindicate their constitutional rights to privacy, dignity and psychological integrity. [...] Their claim, however, is based upon *action iniuriarum* and, therefore, falls to be determined in terms of the *action iniuriarum*. [...] The dispute before us is clearly worthy of constitutional adjudication ... since it involves a nuanced and sensitive approach to the balancing of the interests of the media, in advocating freedom of expression, [and the] privacy and dignity of the applicants irrespective of whether it is based upon constitutional law or common law.

To be sure, there is no clear limit on the Court's substantive jurisdiction given the somewhat crude methodology employed in the above cases. And the Court departed from the express form captured in the document from which it derives its authority. On this trajectory, legal science is reduced to an appeal to the sentiments of a handful of arbiters clothed in the near-impregnable authority to determine the rights and duties of millions. It is not an appealing state of affairs.

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ *NM v Smith* 2007 (5) SA 250 (CC) at paras 29 to 31. I use Woolman's treatment of this passage for greater ease of exposition.

How should justices decide cases?

Pragmatism is unavoidable, even desirable in clear, controlled, modest doses. Legal rules derive from the need to address real-world pressures. And, if the rules fail to address those exigencies, then something is broken.

But law is, as I have argued, a distinct way to regulate relations between people. People disagree. To resolve their disputes they offer argument and proof. But law's character and the division of governmental competencies are subverted if the decider appropriates discretionary power to determine a dispositive rationale that is too wide. Under such conditions, it would be disingenuous to say that the rule of law governed the outcome. The decider's fancy would have done so.

So, the question becomes: how might deciders reconcile competing pressures? How might they accept the need for occasional pragmatism without destroying the nature of law as kind of social ordering and crossing admittedly indistinct, but crucial, delineations of governmental power? I will mention three things they might do, as something of a checklist, to avoid at least some excess: first, deciders should acknowledge the limitations of existing provisions or rationales. They should be candid about the repositories of knowledge to which they reach for rationales when necessary given the insufficiency of extant law. This very act could drive them to confront the room which they could end up granting themselves to tacitly ground their decisions in their biases and preconceptions. In other words, an honest appreciation of what they may do could inspire caution, rigour and humility.

Of course, justices may be reluctant to do so for any number of reasons. They may delude themselves. Or they may want to avoid troubling the public by being frank about just how much power some unelected officials actually wield. Posner reminds us of United States

Chief Justice John G. Roberts's thoroughly – and disingenuously – legalist stance during his confirmation hearings.¹³⁶

Judges' motivations would be uninteresting were judges legalists in the extreme sense endorsed by John Roberts at his hearing for confirmation as Chief Justice. He said that a judge, even if he is a Justice of the Supreme Court, is merely an umpire calling balls and strikes. Roberts was updating for a sports-crazed era Alexander Hamilton's description of a judge as the government official who, unlike an official of the executive or legislative branch of government, exercises judgement but not will, and Blackstone's description of judges as the oracles of the law, implying (if taken literally) an even greater passivity than Hamilton's and Roberts's definitions.

Posner went on to reproach Roberts's description, saying it was merely a ploy to avoid incurring unnecessary political opposition to his nomination for a United States Supreme Court seat:¹³⁷

Neither he nor any other knowledgeable person actually believed or believes that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the Supreme Court, are given to them the way the rules of baseball are given to umpires. We must imagine that umpires, in addition to calling balls and strikes, made the rules of baseball and changed them at will. Suppose some umpires thought that pitchers were too powerful and so they decided that instead of three strikes and the batter is out it is six strikes and he's out, but other umpires were very protective of pitchers and thought there were too many hits and therefore decreed that a batter would be allowed only one strike.

¹³⁶ Posner (note 3 above) at 78

¹³⁷ Ibid.

I submit that while Posner refers to the context of American law, his comments about Chief Justice Roberts are instructive in all comparable jurisdictions.

Second, they ought to recognise that pragmatism should compromise legal predictability as little as possible. Actually, it could be that candour about law's indeterminate nature could encourage responsible pragmatic decision-making in that deciders run larger risks of excessive discretionary liberty when they fool themselves into thinking they are making relatively obvious applications or extensions of the law. As I mentioned earlier, Niblett et al show that judicial decisions do not necessarily converge – which suggests that judicial rigour may well amount to little beyond focussed attention on and thoughtful presentation of outright biases.¹³⁸ Realist contentions would have one believe that the complete eradication of bias is not possible. I agree. I also accept that some cases are so close that perhaps the best one can hope for are good answers rather than right answers. But given the stakes involved (that it is very easy for justices to exceed their mandates and very difficult to hold courts, given the costs of litigation, and especially apex courts, given their control over their rolls, accountable for excesses) courts should employ reasonable steps to restrain themselves. Candour could, I would argue, be a powerful tool in this regard. When deciding a Bill of Rights case, for instance, about an extension of, for argument's sake, same-sex marriage, a court would do well to recognise that it is stepping into several deep areas of knowledge.¹³⁹ It engages moral and political philosophy given the dignity and equality dimensions. It engages developmental psychology, public health and social economics in that from all three of those perspectives, the question of how best to understand the institution of marriage and how best to limit its definition takes on special significance. That is – and, for what it is worth, I personally support same-sex marriage and deliver my points here merely to advance discussion: The opposite sex combination, as a general framework for society, may or may not be the objectively better arrangement for children during early developmental stages. We would need a comprehensive measure of risk factors to which young people may be exposed and an idea of whether same-sex parental combinations could offer, from an institutional and *not* case-by-case standpoint, the same protection against some of those factors. If not, then from a public health perspective, are we, with great respect, undermining general human capabilities by recognising same-sex marriage rather than strengthening the

¹³⁸ Niblett et al (note 73 above)

¹³⁹ I am aware that this question has been disposed of in our jurisprudence.

opposite sex conception? And if so, what are the implications for society and general human well-being? Other than saying I support same-sex marriage (albeit based on theoretical and empirical ground of which I am uncertain), I take no substantive positions on some of the considerations I have brought up here. I merely state these considerations to illustrate the complexity of issues that judges may decide. And given this complexity, humility-inducing mechanisms are, I would contend, desirable, even necessary.

Third, deciders should also take text seriously. For instance: section 33 of the Constitution mandates the PAJA. If that resultant law is defective, the solution is to remedy the law through a democratic legislative channel. By effectively developing an alternative stream of law in the legality principle because of the threshold-related difficulties with the PAJA, the courts not only bypass section 33 by avoiding the problems with its animating legislation, they enfeeble it by doing so as well. Pragmatism that takes its cue from and tethers itself to text, together with candour about the extra-legal disciplines in which controlling rationales are actually grounded, may well encourage a wholesome combination of humility and analytical rigour in deciders. And, more relevantly to this thesis: complainants and their lawyers could have greater clarity about how justices decide. They could thereby have greater clarity about how to develop their cases when close or new issues are engaged. This dynamic could well bolster the distinctly legal way of ordering human relations more than the loose, fuzzy, sentiment-based reasoning that often rationalises doctrine extension. As to what I mean by adhering to text: I do not mean searching for perfectly clear direction in the texts. Sometimes provisions are deliberately framed widely, thereby allowing for the addition of content and clarification of scope over time and with the benefit of developments in understanding. And that is a good thing. Framers (or drafters) do well to remember that future issues are often presently unknowable. And to couch provisions too narrowly can stunt a constitution's ability to retain the ability to adequately cover actual incidents and controversies that even especially broad-minded people may not have anticipated. What I mean is following structure for adjudication. If a text lays out steps to be taken in adjudicating, the court should make following those steps a priority. I also mean that if a constitution does not expressly contemplate something, then justices should tread particularly carefully. I am not one who believes that textual silence necessarily means jurisdictional nonexistence. However, if justices wish to recognise principles that texts do not expressly contemplate, they should be especially reluctant and circumspect because the

dangers to not only judicial legitimacy but also, in relatively extreme cases, social stability, are real. One need only look at the impact of *Roe v Wade*, the famous abortion rights case in the United States, to observe the impact of expansive understanding of judicial discretion on a court and society at large.¹⁴⁰ Republican presidential candidates still, as a matter of course, denounce the decision, often by likening the constitutional protection of abortion to the notorious antebellum matter of *Dred Scott v Sandford*, the case wherein the United States Supreme Court ruled that African Americans could never sue in federal court because they could not be American citizens.¹⁴¹

Conclusion

Over these last few months I have often wondered at the difference between constitutional and administrative law on the one hand, and political science on the other. Yes, I am conflating constitutional and administrative law (two related, but distinct, areas) for convenience here. But, that analytical laxity aside: They are heavily informed by political science. For instance, a bill of rights controls, at least on the face of it, power relations in society. That smacks heavily of governance studies. Administrative hearings are, in part, predicated on the idea that societies work better if they are inclusive. A law really just represents *a* perspective on some issue or concern that is more accurately situated in some other discipline. If that perspective changes, a legislature or competent court will probably change the law. This very simple observation explains why pragmatism is unavoidable. It also partly explains why courts and legislatures will inevitably clash: there is no neat, readily identifiable, divide between one's province and the other's in hard cases. But despite its indeterminate nature, law has an important role to play as a social controller, as it were. And, unless judicial discretion is reigned in, the law cannot fulfil its role as a social regulator and courts may overstep the bounds of their legitimate influence, thereby undermining a constitutional structure aimed, in significant measure, toward decentralising governmental

¹⁴⁰ 410 US 113 (1973). Toobin says that the United States Supreme Court read into the unexpressed right to privacy the protection of a woman's right to have an abortion and that its decision to do so remained perhaps the most divisive issue before the court, partly because it was perceived as a judicial power-grab see Toobin J. *The Nine: Inside the Secret World of the United States Supreme Court* (2008) at 56. This situation became especially volatile during the 1992 Presidential campaign when the US Supreme Court upheld the privacy-based right to abortion – with some changes – in the matter of *Planned Parenthood v Casey* 505 US 833 (1992).

¹⁴¹ 60 US 393 (1857)

power with a view toward warding off the threat autocracy and the concomitant danger of social upheaval. The Constitutional Court would do well to remember that.

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